No. 16994

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO., a corporation, and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Appellee.

Brief of Appellee

Appeal from the United States District Court for the District of Idaho, Eastern Division

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BEN PETERSON
RUBY Y. BROWN
Residence: Pocatello, Idaho
Attorneys for Appellee

GATEWAY PRINTERS—POCATELLO

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STATEMENT OF THE CASE

The instant litigation is a long, drawn-out contest between two insurance companies concerning which of the two companies are obligated to pay a Judgment referred to and particularly described in the Brief of Appellants.

This is the second time this case has been before this Honorable Court. The Appellee, Western Casualty and Surety Company, a corporation, issued its liability policy to Wil-

liam Gagon, Soda Springs, Caribou County, Idaho, whose occupation in said policy was described as "Lumber Business, Builder, Hardware Dealer, Self, Soda Springs;" Insurance Policy No. UI 518973 describing a certain Chevrolet truck. The policy of insurance contained the usual and common clause frequently referred to as an "omnibus clause" as set forth in Appellee's insurance policy reads as follows:

> "With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission." (Sec. III of 'Insuring Agreements' in Policy.)

The Appellant in this action has issued its policy described as comprehensive general and automobile liability (Broad form insuring agreement) (R. 65 and 99).

The entire policy of insurance issued by the Western Casualty and Surety Company, a corporation, is shown in the transcript (R. 50 to 57).

The policy was issued for commercial purposes as shown by the policy itself in this language: "The purposes for which the automobile is to be used are COMMERCIAL—CLASS 5CA." Paragraph 5CA of the policy states: "The

term 'commercial' is defined as used principally in the business occupation of the named insured as stated in Item 1 (Item 1 says: Lumber Business, Builder, etc.) including occasional use for personal pleasure, family and other business purposes."

An examination of the wording of the policy makes it clear that the insurance company contemplated use of the truck by the named insured, William S. Gagon, and by his authorized employees. The policy being written directly in connection with the operation of the insured's business it surely did not contemplate use of the truck in the business of the C. H. Elle Construction Company, nor did the company by the restrictive provisions of the policy charge any premium for the use of the car, not connected with the business of Gagon, nor a use of the truck he did not specifically authorize.

On or about the 22nd day of August, 1954 one M. Burke Horsley, an agent and employee of the Appellant, C. H. Elle Construction Co., a corporation, went to the place of business being operated by Mr. Gagon for the purpose of borrowing a Chevrolet truck described in the Western Casualty and Surety Company policy. Mr. Gagon was the named insured in said policy of insurance and the only named insured in said policy, written by the Western Casualty and Surety Company, a corporation (R. 51). The named insured, Mr. Gagon, was not present on this occasion and so Mr. Horsley contacted Mrs. Gagon at her home and Mrs. Gagon went to the lumber yard and got the keys for him on a Sunday

when the lumber yard was closed. The keys to the truck were in the cash register. Mr. Horsley had met Mrs. Gagon at the lumber yard and she gave him the keys and located the truck and went away and Mr. Horsley drove the truck out of the lumber yard. At this time there was no talk of any rental for the use of the truck (R. 110-111).

Neither Mr. Horsley nor the C. H. Elle Construction Company, a corporation, had ever previously borrowed equipment of the Gagon Lumber Yard (R. 111) and no slip was made out for the borrowing or for any charge (R. 112 and 115). In the operation of the truck Mr. Horsley was involved in an accident from which death resulted and the subsequent suits instituted in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, all as set forth in Appellants' Statement of Facts.

Mrs. Gagon, upon whose permission to use the truck Appellants rely, had nothing to do with the operation of the lumber yard except as a part-time bookkeeper (R. 115).

At the time the truck was taken by Mr. Horsley no arrangements were made concerning any charge or rental for its use (R. 118).

There was no intention on the part of the insured, William S. Gagon, to make any charge for the use of the truck until after he had consulted his attorney (R. 124).

The policy issued to William S. Gagon by the Appellee

herein contains the following provision:

> "18. Other Insurance. Coverages A, B, D, E-1, E-2, F, G-1, H, I and J. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise."

The name of the insured in the policy written by Appellee is William S. Gagon. The so called "omnibus clause" of the policy, as above stated, provides that such policy of insurance shall enure to the benefit of any person using the automobile provided the actual use of the automobile is by the named insured or with his permission. This provision of the policy of insurance does not, as in some cases, provide that permission may be given by an adult member of the insured's household or by some other person but is limited to permission of the named insured; in this case, William S. Gagon.

The Honorable Chase A. Clark, United States Judge for the District of Idaho, upon a presentation of this matter to him found that the St. Paul-Mercury and Indemnity Co., a corporation, had issued its policy of insurance insuring the C. H. Elle Construction Company, a corporation, against loss from all sums as C. H. Elle Construction Company, a corporation, shall become obligated to pay by reason of liability imposed by law for bodily injury. The Trial Court also found that the Western Casualty and Surety Company, a corporation, Appellee herein, had issued its automobile policy insuring a 1954 Chevrolet 2-ton truck and that said policy also provided insurance against business liability for personal injury in the amount of $10,000.00 for each person (R. 229).

The Trial Court also found that the policy issued by Appellee was a policy of insurance issued exclusively in the lumber yard business of William S. Gagon and further found that M. Burke Horsley, upon the 22nd day of August, 1954, was an employee of the C. H. Elle Construction Company, a corporation, and that upon the 22nd day of August, 1954 the said M. Burke Horsley attempted to contact William S. Gagon, the owner of the truck insured in the policy issued by Appellee. The Trial Court further found that at said time the named insured was not available and that the said M. Burke Horsley contacted Mrs. Jessie Gagon at her home and borrowed the truck from her and she obtained the keys for him at the lumber yard. The Trial Court further held that at the time of the accident involving the Chevrolet truck owned by William S. Gagon that the said truck was

being driven by M. Burke Horsley without the permission, express or implied, of the named insured in said policy, namely, William S. Gagon.

The Trial Court further found that at no time previous to this occasion had M. Burke Horsley borrowed the said truck or used the said truck as an employee of the C. H. Elle Construction Company, or any other truck owned by William S. Gagon in the furtherance of his business or the business of the C. H. Elle Construction Company, a corporation.

The Trial Court further found that after M. Burke Horsley had borrowed the truck from Jessie Gagon and had driven it away from the Gagon Lumber Yard that the said truck was involved in an accident in which a certain Arnold Campbell was killed and the Court found that the truck, at said time and place, was not being used with the knowledge or permission, express or implied, of the named insured in said policy, nor was the lending of said truck ever ratified by said named insured nor did said named insured, at said time or at any other time, directly or indirectly authorize M. Burke Horsley, or grant permission to him to use said truck as an employee of the C. H. Elle Construction Company, a corporation. Further, the Court found that neither on said date nor on any other date had Jessie Gagon loaned the equipment of the Gagon Lumber Yard and this particular truck to any person, including M. Burke Horsley. The Trial Court further found that the said Jessie Gagon was not a named insured in said policy of insurance written by Western Casualty and Surety Company, a corporation,

Appellee herein.

The Trial Court further found that the said Jessie Gagon kept the books of the Gagon Lumber Yard and had nothing to do with buying, selling, or handling the business affairs of said lumber yard except in a limited capacity, nor was she named in said policy of insurance.

The Trial Court further found that at the time of the accident referred to herein in which Arnold Campbell was killed the truck owned by William S. Gagon, insured by Appellee herein, was not being used with either the knowledge or permission of the named insured in said policy (R. 228-234).

It is from these findings of fact and from this state of the record that Appellants have taken their appeal to this Honorable Court.

SUMMARY

The Western Casualty and Surety Company, a corporation, Appellee herein, summarizes its position in this litigation as follows:

I.

That the policy of insurance issued by Appellee to William S. Gagon, "Lumber Business, Builder, Hardware Dealer, Self, Soda Springs" provided that in the usual form of "omnibus clause" that said policy of insurance would oper-

ate to provide protection not only to the named insured but to other persons who used the truck with the permission of the named insured. The named insured in this policy did not ever give his permission to the use of the truck by M. Burke Horsley who, at the time of taking said truck was in the employ of the C. H. Elle Construction Company, a corporation, who in turn was insured by the Appellants herein against any legally imposed liability and that, therefore, the permission of the named insured, either express or implied, was never given and M. Burke Horsley did not become an additional insured under said policy in accordance with the provisions of the "omnibus clause" of said policy set forth herein.

II.

That the said William S. Gagon, the named insured in the policy issued by Appellee, had never designated Jessie Gagon, his wife, either by implication or expressly, as an agent for the purpose of loaning this vehicle or doing any other thing in the lumber yard, save and except the task of part-time bookkeeper and that the action of Jessie Gagon in loaning said truck had never been ratified by the named insured, by Appellee herein, or by anybody else and that, therefore, Appellee herein had no obligation to defend said suit, pay said Judgment, or reimburse Appellants herein for any sums they have paid in satisfaction of said Judgment or any sums they have paid by way of attorney fees or costs in the defense of said Court action.

III.

That the filing of the SR-21 Notice of policy under Section 5 of Idaho Motor Vehicle Responsibility Act does not constitute an admission of policy coverage and the statute of Idaho providing for the filing of a SR-21 Notice of existence of policy, by its terms, expressly prohibits the use of said Notice for any purpose.

IV.

The relationship of husband and wife, standing alone, does not constitute the wife the agent for the husband.

V.

The findings of the Trial Court being supported by competent adequate evidence should be reversed on appeal.

VI.

Due to the restrictive use of the vehicle described in the policy written by Appellee, insurance coverage could not be extended to the use of said vehicle in business or pleasure other than that of the named insured; namely, William S. Gagon, and could not be extended under the "omnibus clause" for use of Horsley engaged in carrying forward the business of the C. H. Elle Construction Company, such coverage never having been extended by the policy.

VII.

The policy written by Appellant providing liability in-

surance to the C. H. Elle Construction Company provides limits of $50,000.00 and $100,000.00. (R. 89). The policy written by the Western Casualty and Surety Company provides liability coverage in the amounts of $10,000.00 and $20,000.00; that is, $10,000.00 for one person and $20,000.00 for one accident. The policy written by Appellee provides if the insured has other insurance against a loss covered by the policy the company shall not be liable under this policy for a greater proportion of the loss than the applicable limit of the liability bears to the total amount of liability of all available collectible insurance.

ARGUMENT AND AUTHORITIES

I.

THE USE OF THE CHEVROLET TRUCK INSURED BY APPELLEE WAS WITHOUT THE PERMISSION OF THE NAMED INSURED

One of the questions to be decided in this matter is: Was M. Burke Horsley operating the vehicle in question with the permission of the named insured? The Appellee's insurance policy, in Paragraph III thereof, under the general heading, "Insuring Agreement," provides:

> "With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word insured includes the named insured and also includes any person, while using the automobile, and any person or organization legally re-

> sponsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

This Honorable Court will, at the outset, note that this particular policy provides "with his permission," and it is to be noted that nobody else, such as members of the family or employees are added to the persons who may give permission for the use of the car. Further examination of the policy reveals that the name of the insured is William S. Gagon. It is also to be noted at the outset that this policy was not insuring a family car, but was issued, under Item V of the policy, for commercial use, Class 5CA. Appellee takes the position that by the policy expressly and clearly providing that the named assured is the only person authorized by the policy to give permission for another to use the car or truck, it should be construed exactly as it is worded. This basic premise is supported by the language of the Court's opinion in Holthe v. Iskowitz, 197 P. 2d 999 (Wash. 1948) in which the court quoted with approval from 7 Appelman, Insurance Law and Practice, Sec. 4354 which read:

> "In deciding whether the particular policy extended to the operator, the court will seek to ascertain the intention of the parties. Whenever the term 'named insured' is employed, it refers only to the person specifically designated upon the face of the contract;" . . . Id. at 1002.

If it had been the intent of the defendant company to extend

coverage to getting permission from someone other than the named insured, it is apparent that the policy should have so provided. Many of the more recent policies provide that permission may be given by the named insured or adult members of his family or household. However, such is not the wording of the Western Casualty policy, Appellee herein. It should be noted that at the time Jessie Gagon gave the keys to M. Burke Horsley that the named insured, William S. Gagon, was not present and did not acquiese in the permission granted. This is not a case in which permission was granted in the presence, or with the full knowledge, of the named insured as in some cases construing such an "omnibus clause." On the other hand, it is a case where the named insured was absent and totally lacked any knowledge of the lending of the truck, nor had he ever acquiesed in its lending by any course of conduct prior to the lending. Attention is called to the fact that the truck was borrowed on a Sunday, the day in which the Gagon Lumber Yard was not open for business. In Mr. Gagon's deposition, as shown on page 121 of the transcript of the record in this case, the following questions and answers were given:

"Q. Would you state, prior to August 22nd, 1954, whether or not you had ever loaned equipment to Mr. Bert Horsley as an employee of the C. H. Elle Construction Company?

A. I had never loaned any; no.

Q. Isn't it a fact that he borrowed an item of your

equipment to carry some steel forms just shortly before that?

A. No.

Q. What arrangements do you have with the C. H. Elle Construction Company for borrowing or loaning vehicles between yourselves?

A. I have some.

Q. Do you have a general understanding with the president of that company?

A. Yes.

Q. And is that—what are the terms of that general understanding?

A. There is nothing. There has been no discussion on loaning equipment at all.

Q. You have loaned it to him before?

A. No.

Q. You have never loaned it before August 22, 1954?

A. No.

Q. Had he ever borrowed from you prior to that time?

A. No.
(R. 121-122)."

It is perfectly clear from the testimony of Mr. Gagon, taken by deposition in this case, that there had been no previous arrangement or dealings concerning the loaning of this or any other truck. In order for the plaintiff to prevail, they must establish that the truck, at the time of the accident, was being operated with the permission of the named insured, William S. Gagon, express or implied. Implied consent is certainly not supported by any previous dealings between the parties. Such previous dealings between the parties is the usual means of showing implied consent or permission. As the court stated in McKee v. Garrison, 221 P.2d 514 (Wash. 1950):

> "Such implied permission is usually shown by usage and practice of the parties over a period of time preceding the day upon which the insured automobile was being used, assuming, of course, that all parties had knowledge of the facts." Id. at 515.

And, in Royal Indemnity Co. v. American Casualty Co., 159 N.Y.S. 2d 45, 47 (1956) it is said:

> "Reliance upon a course of conduct to establish implied permission in the absence of any protest by the owner of the vehicle is misplaced unless it is shown that the owner knew of the alleged practice involving the use of his vehicle by the owner of the prem-

ises; one cannot well protest what one does not know."

The Court's attention is respectfully called to the case of United Services Automobile Association v. Russom, 241 F.2d 296, (5th Cir. 1957). This was a case in which the plaintiff sought to establish permissive use of a vehicle and the circuit court, in holding there was implied permission in that case, points out in the decision on p. 299, the essential and necessary facts to be established in proving implied permission. In that case the court says:

"* * * For despite the fact that the 1948 Oldsmobile was the Critchfield family car for use by both husband and wife and was loaned from time to time by Mrs. Critchfield with the Colonel's acquiesence to friends and relatives for temporary trips, United insists that the Colonel had never expressly clothed his wife with authority to allow others to use it, and Ohio, as a matter of law, declares that the named assured cannot impliedly authorize his permittee to allow sub-permittees to use the vehicle."

Further in that decision, the following appears:

"Enslen was no stranger to the Critchfield household. Indeed, they had an acute interest in him as did he in the 1948 Oldsmobile. A few days before, about January 9, 1950, he had answered the Critchfield's classified ad offering this car for sale

at which time the Colonel allowed him to take it on a short demonstration drive. A day or so later, he returned and, in the Colonel's absence, obtained Mrs. Critchfield's permission to demonstrate the car to his family for a couple of hours. Colonel Critchfield learned of this but never chastised or rebuked his wife or indicated, any more than would any other contemporary husband, that his wife had exceeded the scope of her employment, agency, or authority. Subsequently, a bargain was struck, Enslen gave the Colonel a $250.00 check as a down payment, and the next day Enslen and the Colonel drove the car to a bank to arrange financing. As some delay was encountered in financing, the car was to remain with the Critchfields until the transaction was closed. On the day of the accident, desiring to obtain a new set of tires for this car, (he intended to use the Critchfield old tires on his present automobile to enhance its resale value), Enslen sought, and obtained, Mrs. Critchfield's permission to drive the car to Cincinnati to buy some specially advertised tires."

The accident was reported to Colonel Critchfield's insurance company and subsequently the title to the car was transferred. The Court holds that these facts amply justified the jury in concluding that Enslen had implied permission of Colonel Critchfield to use the car. The case thus provides an additional standard or concept of conduct which gives rise to implied permission to loan the car. In the first place, it was a family

car. In the second place, Enslen had borrowed the car on a good many occasions, all of which were known to the named insured, Colonel Critchfield. The distinction between this case and the instant case is noticeable. All of the things that supported the conclusion that the car was being used with the implied permission of Colonel Critchfield are absent in this case. The truck had never been loaned before, the named insured knew nothing of the lending, the wife had never loaned the truck before, and there was no practice of loaning vehicles between Elle Construction Company and William S. Gagon. Should this case be considered by the court as establishing the minimum qualifications for implied permission, then plaintiffs fall short of establishing implied permission of the named insured. The same Court, on page 300 of the decision, analyzes the Ohio rule and states:

> "For it recognizes that it is but a question of agency and '* * * (named assured) may be implied, as in other agencies, by acts and conduct, but in order to bind * * * (the named assured) by * * * (the named assured * * *'; and in this process, the named assured can '* * * signify her permission to use the insured automobile by a course of conduct, or * * * more silence to bring * * * (the sub-permittee) within the omnibus clause * * *' so long as '* * * such implied permission * * * (was) by act or conduct of * * * the named insured, and * * * amounted to her intended selection of him as such driver * * *.' "

The Fifth Circuit holds that such implied permission can be established through course of conduct, through silence, or through silence or acquiesence. All of these are lacking in the instant case and the present case does not meet the requirements set up by the authority.

In Brochu v. Taylor, 269 N.W. 711 (Wis. 1936) the assured's chauffeur let a maid drive the named insured's automobile which was involved in an accident. Despite the fact that the chauffeur had access to all of the assured's cars, and that he had previously used them at one time or another to perform his duties, the court held that such prior relations did not show implied permission, stating its reasoning as follows:

> "Whether a consent is express or implied depends upon the conduct of the party whose consent must be had. Whatever may be the act, circumstances, or fact, in order to recover under the terms of the agreement, there must be a connection made with the conduct of the party whose consent, either express or implied, is necessary. Thus, there may be acts, circumstances, and facts, such as the continued use of the car, but unless they attach themselves in some way to the acts of the party whose consent must be had there can be no implication of consent arising, because consent signified some fact or act valid. In other words, there must be a nexus between the acts and the voluntary action on the part of him who must consent. The implication, in order to have legal significance, must have the ele-

> ment of mutuality, because in implied consent it is just as necessary to show mutuality as it is in express consent, and as to the latter there is no question that mutuality of agreement must exist."

Appellee would like to respectfully point out to the Court that two elements of permission are set forth in the above case; first, that such consent, whether expressed or implied, must be given by the named insured, and, second, that there must be mutuality between the named insured and the permittee, whether it be expressly given, or impliedly given by a course of conduct clearly demonstrating such implied consent and acceptance thereof.

Nowhere in Appellants' brief is it shown that the "named insured" gave such consent, either expressed or by a clear course of conduct showing implied consent. Thus, the element of mutuality was also lacking.

The Court's attention is also called to the case of Mason and Dixon Lines v. Harry S. Martin, 222 F.2d 328, 4th Cir. In that case the owner of the car and Martin were very good friends for a number of years prior to the accident. Shortly before the accident Martin came home for a thirty-day furlough from the armed forces and Howard and Martin were constant companions. They frequented night clubs and attended social functions. Howard's automobile always provided the mode of transportation for their excursions. Several months later Martin was again home on furlough and he arranged to stay at a place very near the residence of

his friends. Martin was a free spender and bought much food and drink for the boys. On such occasion, also, Howard's automobile afforded them transportation, with Martin and his brother Alan once more doing part of the driving while Howard was in the car. On the date preceding the accident, the activities commenced quite early in the morning and the boys drank beer during the day, and about 7 o'clock in the evening the wheel of the car was put in Martin's hands and he drive for the remainder of the night while they made the rounds of taverns and clubs. Late in the evening, they all decided to have something to eat, except Howard, who sat in the car. Martin was described by the proprietor of the eating establishment as appearing to be quite sober, while the others showed effects of the long day. After leaving the restaurant they returned to the hotel where they were staying that night. Howard, the owner of the car, before leaving or being removed from the car, was arrested for drunkenness. He hired local counsel and both Howard and his counsel wound up in jail. All this happened about 4 o'clock in the morning. Martin brought the car to the jail where Howard and the lawyer were reposing and this is the only occasion in which Martin drove the car without Howard being present. Just before turning in for the evening Martin returned the car keys to Howard, although there is some disagreement about the return of the keys. Howard then went to bed and somehow or other Martin regained possession of the keys. The next thing that happened was that Martin was driving the car alone and was killed. The Court, after reciting these facts, states:

"His purpose in having the automobile at that time is unknown but one thing is certain, he did not have Howard's express permission to use the car at that time; and it cannot be assumed that Martin was using the car at the time for Howard's benefit. Moreover, any prior use of the car by Martin had always been for the mutual benefit of Howard and himself. Much emphasis is placed on their close relationship through the years and especially during the period immediately preceding the accident; but we cannot hold that friendship alone implies permission to use another's car for one's own purpose. Martin's previous use of the car had always been in Howard's presence while in this instance he drove the car, for what purpose only he knew."

Further quoting from the decision, the following appears:

"Numerous cases have been cited but they do not support appellant's position. The l i b e r a l view adopted by Virginia in such matters is laudable but no case is cited which justifies a reversal in the case before us. See Robinson v. Fidelity & Casualty Co., of New York, 190 Va. 368, 57 S.E.2d 93, where the use to which the car was being put was for the benefit of one who stood in the shoes of the named insured; Hinton v. Indemnity Ins., Co., 175 Va. 205, 8 S. E.2d 279, where there was evidence that the owner knew in advance of the use made of the car, and State Farm Mutual Automobile Ins.

> Co. v. Cook, 186 Va. 658, 43 S.E.2d 863, 5 A.L.R.2d 594, where there was evidence that the owner had acquiesced in a similar use prior to the accident. In such cases the courts often state that the course of conduct between the parties implies consent in the particular instance; but we cannot make that statement in this case."

The Court then cites two Circuit Court cases which hold that the permissive use was implied and such cases are distinguished in the Mason & Dixon Lines case. The following quote from Mason & Dixon Lines v. Martin, Supra, has particular application to the present suit:

> "In each case, however, there was a family relationship involved and there was some evidence that the car was being used for the benefit of the owner. Permissive use of a car does not require evidence that the car was being used for the owner's advantage, but, as shown in the foregoing cases, many courts consider such evidence as indicative of implied permission. In the present case there is no such evidence, and as far as Howard was concerned the keys were in his possession and he had no reason to believe that any one would use the car."

Then the Supreme Court upholds the District Court in holding that the District Judge was correct in ruling as a matter of law that no permission to use the car was shown, express or implied. The holding of the case has particular significance

in this case because here it is conceded that the truck was borrowed for the sole benefit of C. H. Elle Construction Company and Horsley; that no arrangements were made to rent the truck or to charge for its use prior to the time it was taken. The truck was operated strictly in the business of the C. H. Elle Construction Company and Horsley was driving the truck as an employee of Elle Construction Company; and as is pointed out by the Circuit Court, this is an important matter to consider in determining whether implied permission was actually given.

The Circuit Court of the ninth circuit has held, in this case, that Appellants can re-present the issue of permissive use to this Court and that they are not collaterally estopped from urging that Horsley had implied permission of Gagon to use the truck. This right of procedure left open to Appellants in this case, however, does not detract from the force and effect which the verdict of the jury in the District Court case should have on this case. It must be remembered that the issue of permissive use was before that jury as it is before this Court. This action was predicated on an Idaho Code provisoin, Sec. 49-1401, which makes the owner liable in tort for the negligence of one who operates the owner's vehicle "with the permission, expressd, or implied, of such owner." The jury found, under the identical facts now before this Court, that there was no permission, expressed or implied, given by Gagon to Horsley. We feel that this Court should give some consideration to the finding of that jury, and in so far as lending weight to that conclusion of the jury, it is immaterial that the jury was asked to deter-

mine whether Horsley had the permission of Gagon so as to attach liability for permissive use under the statute or whether the circumstances indicate permissive use under the policy of insurance. To do otherwise, or find contrary to the jury that Mr. Gagon did grant permission, would indeed be a paradox, and cast some undue reflection on the jury's verdict.

On page 35 of Appellants' Brief is cited the case of Skut v. Hartford Accident and Indemnity Company, 114 A.2d 681 (Conn. 1955). This case also involved the question of permission by the named insured and considerable weight was given to previous findings as follows:

> "It is, of course, true that this finding of agency in the former trial is not conclusive on the defendent in this case to establish coverage under its policy . . . In our opinion in the former case, we said that the evidence warranted the finding by the jury that Pugatch was the agent of the Boardmans . . . If the evidence warranted a finding of agency in the former trial, it is clear that the same evidence warranted the court's finding in the present case that Pugatch was operating with the permission of Mrs. Boardman. A person operating an automobile as the agent of the owner within the scope of its agency must necessarily be operating with the permission of the owner."

Thus, by Appellants' own authorities, it is obvious that the

jury's verdict in the District Court case cannot, and should not, be totally ignored.

Some consideration, as pointed out in the authorities above, should also be given to the proposition that permissive use relied on was not a family use, hence, the wife would not be acting as a member of the family in granting permission to use the car. Since the truck was a commercial vehicle of the Gagon Lumber Company, no benefit could enure to the family, as pointed out in some of the authorities, nor could any benefit enure to Gagon or the Gagon Lumber Yard. The truck was used strictly for the purpose of furthering the plaintiffs' interests. Realistically then, the precise situation is that a commercial vehicle of the named insured was loaned to Horsley on a non-business day, Sunday, by a part-time bookkeeper employed by the named insured, without the knowledge of the named insured, and without authority expressed or implied by a prior source of conduct.

We think it should also be born in mind that the Appellant in this case, the St. Paul-Mercury and Indemnity Company, defended the action on behalf of Elle Construction Company and paid the judgment without the consent of the Western Casualty Company. No appeal was taken from the District Court case, and payment of the judgment was made shortly after the verdict was returned. If, as claimed by Appellants, the Western Casualty Company was the primary insurer, their permission or consent to payment of the judgment should have first been had, and there should have been an opportunity to appeal from the judgment.

Appellants, by their evidence, have fully and completely failed to prove any course of dealings between the parties that would lend support to implied permission. Having proved that the sole benefit received from the use of the truck was that of Elle Construction Company, Appellants grasp at the straw described as ratification of the lending by Gagon himself. This is indeed a slender reed. Ratification, of course, involves principles of agency, but whether the issue is one of agency or permissive use is of little import since the two involve primarily the same element—that of consent. As the Court stated in Varble v. Stanley, 306 S.W.2d (Mo. App. 1957):

> "There is no question that the permission provided in the omnibus clause can be either express or implied from the conduct of those in a position to give it. But as a general rule the person claiming such permission must prove it; and no implied permission can arise merely because someone obtained possession of the property and used it without the knowledge of the named insured. The influence of agency is somewhat akin to the question here, since the relationship of agency involves the element of consent. It can be inferred, but the law indulges no presumption that it exists, and if it is to be inferred it must be from a natural and reasonable and not a forced or strained or distorted construction of the facts." Id. at 666-67.

In the Varble case the insured's son was involved in an ac-

cident while furthering his father's business. Plaintiff, in attempting to show that the son was covered by the father's insurance policy which contained an omnibus clause, proved the following: (1) the son had ready access to the car keys; (2) that he had been allowed to drive the car prior to the accident; (3) that the son had been out to see a man about a prospective roofing job for the employment of both father and son; (4) that the son knew how to drive. The Court, after stating its reasoning as set forth above, declined to find permissive use, holding that too many contradictory inferences could be drawn from such facts. Its emphasis was on clear and convincing proof of agency or permissive use, and not mere isolated occurrences which had little probative value.

The facts of the instant case, while dispelling proof of permission by the named insured, also refute any reasonable or natural agency relationship between Mr. and Mrs. Gagon which might impute permissive use through an agent. Mrs. Gagon was, at best, a part-time bookkeeper for the Gagon Lumber Co. Her natural duties did not encompass loaning company equipment. The truck was loaned on Sunday, not a regular business day. Clearly, such facts negate any type of agency relationship between Mrs. Gagon and the named insured, Mr. Gagon, which would authorize her to grant permission to use the truck. Appellants primarily rely on the fact that Elle Construction Company paid for the rental of the truck to show an agency relationship, and this relationship through the circuitous route of ratification. The facts concerning the charge of rental are clearly set forth in the Circuit Court transcript and on Page 124. The accident occurred

August 22; the statement of rental was not sent out until October 6, and the rental statement, according to the testimony of Mr. Gagon, was sent under these circumstances:

"A. It was made the sixth.

Q. The sixth of what? October?

A. October, I think,

Q. And there is an exhibit there,—

Judge Baum: Mr. Reporter, will you hand him that proposed exhibit?

Q. (Judge Baum, continuing): In whose handwriting is that exhibit?

A. That is my handwriting.

Q. And was that made on the date it bears?

A. Yes.

Q. And it was made by you, was it?

A. Yes.

Q. At whose direction?

A. At my attorney's, O. R. Baum's.

Q. Were you fully compensated for the loss of your truck?

A. No.

Q. What did that bill have to do with reference to your loss that you had not been paid for?

A. It just reimbursed me for some of it.

Q. And do you know how you arrived at the amount?

A. The amount of,—

Q. The amount of that bill?

A. Oh, we just figured that was about the right amount.

Q. Up until that time had any entry been made on any of your books as to any rental?

A. No.

Q. Until this conversation was had with your attorney, at any time had there ever been any idea of your sending a statement for rent?

A. No.

Q. Had you ever rented the truck to Mr. Horsley?

A. No.

Q. Had you ever rented any other truck to Mr. Horsley at any time?

A. No.
(R. 124-125)."

The sending of the statement, by the evidence, was clearly not a ratification of the lending of the vehicle. No charge or rental was made at the time the truck was taken or at any time subsequent thereto until the 6th day of October, and then, by the testimony of Mr. Gagon, the $15.00 charge for the rental of the truck was made upon advice of his counsel. It is perfectly clear from the record that Gagon himself, the named insured, had no intention ever to loan the truck or to ratify the loaning by his wife, under the circumstances hereinbefore more particularly set out. The fact that a statement for a puny $15.00 was sent out more than a month after the accident could hardly be considered as ratification. Also, it may be fairly said of Mr. Gagon that he was extremely unhappy about the lending of the truck, about the tragic accident which resulted from the lending, and about the fact that his truck had been damaged in the conducting of business other than his own and in carrying on business other than that for which the truck was intended. In any event, the circumstances of the billing certainly do not support any contention of ratification. We think it could be said that the statement as much negatives ratification as it does support ratification.

Appellants have cited numerous cases in support of their position that M. Burke Horsley had permission of the named insured to use the truck. A reading of these cases reveals that either they are as much against, as for, Appellants' contention, or else the facts of these cases clearly distinguish them from the controversy now at issue. For example, Appellants cite on page 25 of their brief the case of American Employ-

ers Insurance Company v. Cornell, 73 N.E.2d 70, for the proposition that implied permission may be shown by silence under certain circumstances. In the above case, the assured was a woman who could not drive a car. Her husband gave the car keys to a person who became involved in a collision and who therafter sought the protection of the omnibus clause. However, at the time the keys were given to this person the wife was present at the same table. Under such circumstances, where the wife failed to protest, the court held that such evidence constituted implied consent by silence. Such is obviously not the factual situation involved in the instant controversy.

Another example is the citation of 5-A Am. Jur. 92, Automobile Insurance, Section 94, on page 24 of Appellants' brief. One fact of the quoted material states that implied permission may be determined by usage and practice of the parties over a sufficient period of time prior to the day on which the insured's car was being used. Since the facts of our case show that there had been no usage or practice of loaning the truck prior to the accident, this citation supports the positoin taken by Appellee and in no way supports Appellants' position.

It is interesting to note in citation of Appellants on Page 24 of their Brief and in citing 5-A Am. Jur. 92, Automobile Insurance, Section 94 this Court's attention is particularly called to the use of the words present or past conduct of insured. It is important to note that the text material does not dwell upon subsequent conduct but, in construing whether

or not implied permission was given, uses the words present or past. We submit that in this record there is no evidence of any present or past conduct of the insured which would give rise to implied permission of the wife, Jessie Gagon, to loan the truck.

But for the most part, Appellants' citations state merely that permission may be implied from the facts and circumstances of the particular case. With this contention Appellee does not argue; however, as Appellee has shown, the facts do not support such implied permission.

In like respect, Appellants advance their argument in regard to permission as granted by Mrs. Gagon, Appellants' alleged agent of Mr. Gagon. Appellants cite cases in their brief for the general proposition that a wife may be the agent of her husband. Again Appellee does not dispute this general proposition of agency law. However, the fact remains that merely because the wife may be the agent of her husband, it does not follow that she is agent for all purposes and that any act done by her will bind the husband. It is fundamental agency law that the agent may only bind the principal when the act done is within her course of employment while acting within her scope of authority. Appellants' cases primarily deal with the situation where a family relationship is involved, and not a business relationship as is the situation in the instant case. To reiterate, Mrs. Gagon was a bookkeeper for the Gagon Lumber Yard. The vehicle involved was a truck used in the business of the Gagon Lumber Yard and not a family car. On the day the truck was loaned, Mr.

Gagon was fishing and Mrs. Gagon was at her sister's home, and that this specific day was a Sunday, not a business day. Clearly, such facts fail to support any agency relationship between Mr. and Mrs. Gagon which would empower her with authority to loan the company truck on Sunday and thus grant permission as the agent of the named insured.

Nor does the fact that the truck involved was community property have any effect on the precise issues of this case. Idaho is a community property state and all property acquired by husband and wife during their marriage is community property. However, Idaho law specifically makes the husband manager of the property so acquired and does not in any manner affect the principles of agency in a business situation involving the husband and wife.

In the case of Wigington v. Ocean Accident & Guarantee Corporation, 1930, 231 N.W. 770, 120 Neb. 162, it is held that where legal ownership is in one person who is not the named insured, permission of the owner is not sufficient to give an operator protection under an "omnibus clause" in the policy. Only permission of the named insured satisfies the policy requirements.

The entire subject of implied permission is clearly discussed in Section 4365 of Volume 7, Insurance Law and Practice by Appleman. That section provides:

> "It has been definitely held that it is not essential that express permission be given for use of the automobile by the operator in order to give him pro-

tection as an additional insured; permission may be implied for such use under the facts and circumstances of the case. And wherever the terms 'consent,' 'permission,' or the like, appear in the policy, the court consider that such terms may be read as though the word 'implied' preceded them. A general permission would suffice, although if express permission is relied upon, it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not left merely to inference. An implied permission, on the other hand, is not confined to affirmative action, but means an inferential permission, in which a presumption is raised from a course of conduct or relationship between the parties in which there is mutual acquiescence or lack of objection signifying consent.

Such implied permission is usually shown by usage and practice of the parties over a period of time preceding the day upon which the insured automobile was being used, assuming, of course, that all parties had knowledge of the facts. When this showing is made, there is considered to be a sufficient showing of a course of conduct in which the parties mutually acquiesced to bring the additional insured within the policy protection, provided, of course, that any acquiescence on the part of the insured was by some one having authority to give permission for him. Continuous use by such bailee would raise an inference of implied permis-

sion, the defendant's conduct, on some instances, being sufficient to show an implied permission even though he may not have desired or contemplated the operation on this occasion. Of course, if there were neither express nor implied permission he would not be covered as an additional insured. An Ohio case even stated that it is essential that such consent be shown by the acts and conduct of both parties."

UNDER THE PERTINENT IDAHO STATUTE AN SR-21 FORM DOES NOT CONSTITUTE AN ADMISSION AGAINST INTEREST.

Appellants would have this Court believe that Appellee has admitted liability by the fact that the Appellee filed an SR-21 Notice of Policy under Section 5 of Idaho Motor Vehicle Safety Responsibility Act. Appellants contend that such is a direct admission that Appellee's policy covered the operator, M. Burke Horsley, of the vehicle in question. In support of their contentions, plaintiffs cite two Wisconsin cases, Behringer v. State Farm Mutual Automobile Insurance Company, 82 N.W.2d 915, and Laughnan v. Griffiths, 73 N.W.2d 587. A careful reading of these cases, the Wisconsin Statute involved, and the Idaho Statute which controls, discloses that plaintiffs' contention is totally without merit.

Idaho Code Sec. 49-1511 states:

> "Neither the report required by Section 49-1504, the action taken by the commissioner pursuant to this act, the findings, if any, of the commissioner upon which such action is based, nor the security filed as provided in this act shall be referred to in any way, nor be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages."

Now the existing Wisconsin Statute, Sec. 85.08 (11) contains the above language; however, there is added this very pertinent sentence which is nowhere present in the Idaho statute:

> "This subsection shall not be construed as excluding a notice of insurance filed under subsection (5) (d) from being admissible in evidence where it would otherwise be material and admissible under the rules of evidence."

And, of this last sentence, plaintiffs' own case, Laughnan v. Griffiths, 73 N.W.2d, 587, 594 makes this revelation:

> "We consider that the last sentence of the above quoted subsection clearly recognizes that a SR-21 form may be admissible as an admission against interest on the part of the company which has filed the same."

Therefore, in view of the two statutes and their obvious differences, as pointed out above, it cannot be logically con-

tended that the Idaho Code provision allows the SR-21 form to be used as an admission of liability. To the contrary, it is plain that the Idaho Statute properly excludes the use of the form in the manner Appellants so desire. It follows that if the Legislators of the State of Idaho had desired to have such a form admissible as evidence, they would have done so in terms similar to the Wisconsin Statute. The absence of such a provision is an expression of their desire not to do so and the plaintiffs cannot validly contend otherwise under the present Idaho Code provision.

The Idaho Statute provides, and common sense dictates, that the final determination of who is the ultimate insured must be left to other means than the filing of an SR-21 form by an agent of a given insurance company who is unaware of the pertinent facts and circumstances, and the ramifications involved in making such a decision. As shown by the cases cited in both Appellants' and Appellee's Briefs, the decision is a difficult one and even the Courts are in disagreement with regard to what factors or tests are relevant and applicable.

Particular attention should be taken of the wording of our Statute, Section 49-1511, and particularly this language:

> "* * * nor the security filed as provided in this section shall be referred to in any way, nor be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages."

The Court will note that the provision in the Statute stating that the security shall not be referred to in any way is disjunctive from the rest of the paragraph which says that the filing of such security will not be evidence of negligence. The plain, simple language of the Statute prohibits the use of the filing of the security in any way. Under our Statute then, as the same is worded, the filing of evidence of financial responsibility or security cannot be used by any party to the litigation for any purpose. This is a very obvious reason for this requirement in the statute and if the furnishing of financial responsibility constituted or was evidence of liability or coverage, insureds and insurance companies would certainly be reluctant and completely unwilling to file such forms. To say that such filing was an admission of coverage would defeat the entire purpose of the statute and for that reason, use of the filing for any purpose is forbidden. Hence, Appellant cannot prove coverage by the filing of the form.

IT IS A RECOGNIZED PRINCIPLE OF LAW THAT THE RELATIONSHIP OF HUSBAND AND WIFE DOES NOT, OF ITSELF, GIVE RISE TO AGENCY.

The agency of one spouse for another is established very much in the same way as agency in any other circumstances. It may be created by express designation or agency or by conduct of the parties, and as pointed out in the Brief of Appellants and the authorities in support of their statement, that the existence of agency by husband and wife may be proved by facts and circumstances surrounding the relationship. Thus, where the husband permitted his wife to attend to certain business of the husband, such conduct could establish

the relationship of principle and agent. The authorities that we have examined upon this point are not in doubt. When, however, the known principles of law are applied to the instant cases, we find the facts and circumstances fall short of establishing the fact that the wife in this case was the agent of the husband for the purpose of loaning the vehicle. Here the wife admittedly served in the lumber yard only as a part-time employee and her work there was limited to bookkeeping. This limited agency would not extend to her to order materials used in the store or to have authority to act on behalf of her husband to grant permission to use this vehicle. When viewed in the light of, and coupled with the fact that she had never previously loaned any equipment of the lumber company, and in view of the further fact that her actions in loaning the truck were never acquiesced by the named insured, this argument presupposes that an agent or servant of the named insured could grant permission to use the truck. Such we do not believe to be the fact. The policy is limited to permission granted by the named insured and the named insured is William S. Gagon. The Court's attention is called to the fact that no reference is made in the policy to William S. Gagon or any agent, servant, or employee. In the absence of such an extension, it is felt that the only person who could give permission to the use of the truck is as qualified in said policy, namely ,William S. Gagon, and certainly under the circumstances here presented, the permission of Jessie Gagon would not operate so as to cause M. Burke Horsley to be an additional insured within the policy .

26 Am. Jur., Section 236 states:

"A wife is not the agent of her husband by force of the marital relationship between them. He may, however, at common law and under statute make her his agent and be bound by her acts as such. The agency relationship in such case ordinarily rests upon the same considerations as any other agency; she is his agent, and he is bound by her acts as his agent, only when her agency is express, implied or ostensible. The insanity of the husband does not make her his general agent, authorize her to transact his business generally, or authorize her to transfer his property to pay debts.

Express authority given by a husband to his wife to purchase on his credit is not revoked by their separation with respect to one furnishing her with goods or services in reliance on such authority and without notice of the separation.

One seeking to hold a husband to a liability through the agency of his wife has the burden of proving express authority on the part of the wife, or facts and circumstances establishing such authority by implication, but where he has done so, it becomes incumbent on the husband to introduce evidence in rebuttal. Testimony that a wife did all her husband's business is admissable on the question of her agency in a paritcular transaction within that time.

The question of agency of the wife for the husband, if there is any evidence to show it, and the question whether an agency once created was terminated before a contract or a purchase by her, are ordinarily for the jury.

II.

THE FINDINGS OF THE TRIAL COURT, BEING SUPPORTED BY COMPETENT AND SUFFICIENT EVIDENCE SHOULD NOT BE OVER-RULED.

Under Rule 52 (a), findings of fact may not be set aside unless clearly erroneous as stated by the Supreme Court:

"Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, the Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

U. S. v. U. S. Gypsum Co., App. D.C. 1948, 68 S. Ct. 525, 333 U.S. 364, 92 L.Ed. 746.

In the case of Tucker v. Dr. P. Phillips Co., C.C.A. 5th, 1945, 148 F.2d 904 it is held:

> "Findings of fact are not 'clearly erroneous' unless unsupported by substantial evidence or clearly against the weight of the evidence or induced by an erroneous view of the law."

In the case of Nee vs. Linwood Securities Co., C.A.8th, 1949, 174 F.2d 434 it is held:

> "The mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. The appellate court does not consider and weigh the evidence de novo."

In the case of Lassiter v. Guy F. Atkinson Co., C.A. 9th, 1949 176 F.2d 984, it is held:

> "In considering whether trial court's findings are clearly erroneous, appellees must be given the benefit of all favorable inferences which reasonably may be drawn from the evidence."

In the case of Knapp v. U. S., C.C.A. 7th, 1940, 110 F. 2d 420 it is held:

"In determining whether substantial evidence supports a finding, the court of appeals must assume as established all the facts that the evidence reasonably tends to prove."

Rule 52 (a) in part provides:

"* * * Findings of fact shall not be set aside unless clearly erroneous. In the application of this principle regard shall be given to the special opportunity of the trial court to judge of the credibility of those witnesses who appear personally before it."

Appellee recognizes the distinction between findings of the Trial Court that are predicated upon oral testimony of witnesses and the situation which results when the facts are presented by deposition or documentary evidence. Nevertheless, the rule is clear that the findings shall not be set aside unless clearly erroneous and this statement in the rule is simply modified by the statement that regard shall be given to the opportunity of the Trial Court to change credibility of witnesses which does not detract from the primary proposition that findings of fact should not be set aside unless clearly erroneous.

In the instant case, a finding by the Trial Court that M. Burke Horsley did not have permission of the named insured to use the truck is amply supported by the evidence. In other words, the named insured, William S. Gagon, did not authorize or permit the use of the truck but this was done

only by his wife who was not a named insured. The Trial Court had ample evidence that she had never been designated as an agent for general purposes at the lumber yard; that she had never, on any previous occasion ever loaned the truck or did any other similar thing in the operation of the lumber yard; that there was no course of dealing between the named insured and the C. H. Elle Construction Company or M. Burke Horsley which would give rise to an implied course of dealings; likewise, there was ample evidence in the record that her actions in this regard; to-wit, loaning of the truck, was never contemplated or ratified by the named insured. All of these matters the Trial Court varily considered and concluded that the truck, at the time of the fatal accident, was not being operated with the permission of the named insured and such finding on his part, falls clearly within the purvue of the Trial Court and it cannot be said, it seems to us, that these findings by the Court are clearly erroneous but are well warranted and amply justified by the evidence.

III.

BY REASON OF THE RESTRICTIVE USE OF THE VEHICLE PROVIDED FOR IN THE POLICY WRITTEN BY APPELLEE COVERAGE COULD NOT EXTEND TO THE USE OF THE VEHICLE IN THE BUSINESS OF C. H. ELLE CONSTRUCTION COMPANY.

The Court's attention is called to the particular wording of the policy issued by Appellee. The pertinent parts, in so

far as this point is concerned, are as follows:

NAME OF INSURED	William S. Gagon
ADDRESS	Soda Springs, Idaho
OCCUPATION OF NAMED INSURED	Lumber business, Builder, Hardware dealer, Self, Soda Springs

The policy further provides, under Item V as follows:

> Use: The purpose for which the autmobile is to be used is Commercial, Class 5A.
>
> (a) The terms pleasure and business are defined as personal pleasure, family, and business use.
>
> (b) The term commercial is defined as used principally in the business occupation of the named insured as stated in Item I including occupational use for personal pleasure, family and other business purposes.
>
> (c) Use of the automobile for the purposes stated include the loading and unloading thereof (R. 51).

It is apparent from an examination of the above provisions that a definite limitation is placed upon the use to

which this vehicle could be put in so far as liability under the policy of insurance is concerned. At this point it is to be noted that the vehicle at the time of the accident resulting in death was being driven by an employee of the C. H. Elle Construction Company who, at the time, was furthering the business of the C. H. Elle Construction Company and not that of the William S. Gagon Lumber Yard. This case, thus presented, has been passed upon in other cases. In the case of Farm Bureau Mutual Insurance Company vs. Daniel, 104 F.24 477, the 4th Circuit Court held:

> "The declarations of purpose in the pending case were not confined to the application. They were inserted in the declaration in the body of the policy and they marked the boundaries of the risk which the insurer agreed to assume; and since the car was not used for the declared purposes at the time of the accident, it was not covered by the policy. It is generally recognized that an automobile is covered by an insurance policy only when it is being used for the purposes declared therein."

The Court further held, on Page 479 of the opinion:

> "It is clear from this recital that at the time of the accident the Ford truck was being used for the purposes of the garage business, which were not listed among the purposes declared by the insured in item 6 of the declarations of the policy. On the return trip to the garage the articles in the truck per-

> tained to the garage business, and the truck itself was being used in that business. * * * It is nevertheless contended that the truck was covered at the time of the accident by reason of the definition of the insured contained in paragraph III of the insuring agreements of the policy. This is the so-called omnibus clause of the policy whereby protection is extended not only to the named assured, but also to "any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is 'pleasure and business' or 'commercial,' each as defined herein, and provided further that the actual use was with the permission of the named insured."

It was contended in that case that reference to the use appeared in the policy only for the purpose of identification and not for limiting the risk and it was further contended that the coverage extended to any use of the car within the description "pleasure and business" or "commercial."

The Court, in viewing these contentions, held, on Page 479:

> "We do not think that the policy is reasonably susceptible of this interpretation. The primary function of the omnibus clause was not to define the purposes to which the car was to be put, but to state the conditions under which the coverage would be extended to include not only the named

insured, but also other persons while using the car with the permission of the insured. The condition of the extension was that the use of the car declared in the policy and the actual use thereof be 'pleasure and business' or 'commercial'. In the pending case the declared use was not stated in general terms to include all purposes of business or pleasure, but was limited by item 6 of the declaration to particular kinds of business that did not include the operation of a garage; and the policy was limited in its application by the express terms of paragraph V to accidents sustained while the automobile was used for the purposes stated in the declarations. Moreover, the insuring agreement was limited by the conditions and terms of the policy. Only by eliminating these definite provisions from the policy would it be possible in our opinion to accept the broad terms of the omnibus clause as correctly describing the coverage."

The factors in the above cited case and in the present case are practically identical.

In the case of Snyder vs. National Union Indemnity Co., 65 F.2d. 884, the Court held as follows:

"Of course, appellee's liability is only contractual and must be determined by the terms of the policy. Plainly this truck was a commercial vehicle, and its use is restrained under the policy by 9 (b) of

> Declarations. Under said clause (b) it was provided that the truck could be used only in the business described in Declaration No. 4—that is, in the business of Sam Holland as a merchant, including loading and unloading and incidental pleasure use of the named assured's family, no exceptions. The named assured was Sam Holland. This excluded its incidental pleasure use by all others than the named assured's family, 'no exceptions.' Obviously those riding in the truck wtih Day at the time of the accident were not the named assured's family, or members thereof, and under the facts the four persons riding with Day, including the two children were in the truck as 'incidental pleasure use' of it. Had they paid a consideration as passengers they would have been excluded under the forepart of said paragraph 9; and the policy under the clause quoted supra expressly provides that it 'does not cover while any automobile insured hereunder is being used for any purpose other than as specified in Declaration No. 9."

The analagy of the foregoing case to the present case is clear. The policy written by Appellee was written for use in the lumber yard business of the insured and was not written in the business of the C. H. Elle Construction Company, and no matter who gave the permission it would not extend to the use to which it was being put upon the occasion of the accident.

IV.

THE POLICY ISSUED BY APPELLANT PROVIDED THAT SHOULD OTHER INSURANCE EXIST COVERING A LOSS UNDER ANY OTHER POLICY OR POLICIES THAT THE LIABILITY EXTENDED BY THIS POLICY WOULD ONLY BE EXTENDED FOR THE EXCESS OVER AND ABOVE SUCH OTHER INSURANCE.

The policy written by Appellee provides that should there be other insurance that the policy issued by Appellee would pro rate according to the proportion of such loss that the application limit of liability stated in the declaration bears to the total valid and collectible insurance. The provisions of the two policies are in conflict no matter how the policies are construed. However, the extent of the liability of the policy issued by Appellee could not exceed the first amount of the policy as shown in the policy (R. 51).

CONCLUSION

We submit, therefore, that the Trial Court was well justified under the evidence in finding that the operator Horsley did not have the permission of the named insured to drive said truck, either express or implied and that the Trial Court's findings upon this subject are well supported by authorities and by the evidence and should not be reversed or modified by this Honorable Court. We submit further that the limitations provided for in the policy issued

by Appellee are such that Appellee never insured against the type of permissive use shown by the evidence in this case. The policy never contemplated the use of the vehicle in the business of the C. H. Elle Construction Company. These limitations are clearly shown by the wording of the policy itself as set forth in this Brief; and, further, that the liability of Appellee is limited to the amount of insurance written as compared with the amount of insurance written by the Appellant and that, therefore, and for all the reasons hereinbefore set forth the judgment of the Trial Court should be sustained.

Respectfully submitted,

O. R. BAUM

BEN PETERSON

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APPENDIX
EXHIBITS

Exhibits	Identified	Offered	Received
Plaintiffs Exhibit A	R112	R114	R152
Defendants Exhibit 1	R116		
S. R. 21	R58-59		R105, 151
Exhibits Attached to Stipulation:			
Exhibit A	R153		R153
Exhibit B	R159		R159
Exhibit C	R166		R166
Exhibit C-1	R172		R172
Exhibit D	R177		R177
Exhibit E	R177		R177
Exhibit F	R40-41		R40-41
Exhibit G	R179		R179